No. 16-17296

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WEST ALABAMA WOMEN'S CENTER, et al., on behalf of themselves and their patients,
Plaintiffs – Appellees,
v.
DR. THOMAS M. MILLER, in his official capacity as State Health Officer, et al.,
Defendants – Appellants.

On Appeal from the United States District Court
For the Middle District of Alabama
No. 2:15-CV-00497-MHT-TFM

BRIEF FOR THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTRODUCTION AND INTEREST OF AMICI

The over 64 million women who live in the amici States contribute in essential ways to the economies and social fabric of their families, communities, and the Nation. As the Supreme Court has observed, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion). The amici States are committed to protecting women's constitutional right to exercise that control through access to comprehensive reproductive healthcare, including safe and medically-sound abortion services. Amici file this brief pursuant to FRAP 29(a)(2).

The amici States have a strong interest in ensuring that federal law is interpreted and applied correctly to ensure women's continued access to the full range of reproductive healthcare. The burdens that result from restricting access to abortion—particularly second-trimester services—often fall disproportionately on a State's most vulnerable residents. And apart from the intrinsic value of protecting residents' constitutional rights, the States know from experience that restricting access to reproductive healthcare also burdens the public.

The Alabama statute at issue in this case would effectively ban the standard dilation and evacuation ("D&E") procedure—the most common and safest method of second-trimester abortion. Ala. Code § 26-23G-1 to -9 (2016). Alabama's law is part of a larger national strategy to limit access to abortion care and interfere with women's constitutionally protected right to make reproductive choices.[1] Several other States have enacted or are considering similar statutes, based on model legislation crafted by the National Right to Life organization.[2] When challenged, these statutes have been enjoined by the courts; but similar legislation is still pending in several other States.[3] Bills have also been introduced in both the U.S. House of

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[1] *See, e.g.*, Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, 20 Guttmacher Policy Review 35, 35 (2017), https://www.guttmacher.org/sites/default/files/article_files/gpr2003517.pdf.

[2] Donovan, *D&E Abortion Bans* at 35-36; ReWire News, *Legislative Tracker: Dilation and Evacuation Bans* (Mar. 16, 2017), https://rewire.news/legislative-tracker/law-topic/dilation-and-evacuation-bans; *see also* National Right to Life, *Protecting Unborn Children from Dismemberment Abortions*, http://www.nrlc.org/statelegislation/dismemberment.

[3] 2017 Ark. Acts 45 (H.B. 1032) (enacting Ark. Code Ann. §§ 20-16-1801 to -1807 effective June 6, 2017; not yet subject to a court challenge); Kan. Stat. Ann. §§ 65-6743 to -6749 (2015) (temporarily enjoined by the Court of Appeals of Kansas in *Hodes & Nauser MDs, P.A., et al. v. Schmidt & Howe*, 52 Kan. App. 2d 274, 275, 368 P.3d 667, 668 (2016)); La. Rev. Stat. Ann. § 40:1061.1.1 (2016) (state stipulated to non-enforcement pending further litigation in *June Medical Servs. v. Gee*, Case No. 16-444 (M.D. La.

(continued…)

Representatives and the U.S. Senate.[4] These proposals all attempt to curtail women's access to the standard method of second-trimester abortion, and present a clear threat to the ability of women to access safe and medically-sound reproductive healthcare.

The amici States recognize and share the interest of Alabama and other States in ensuring that legitimate legislative judgments regarding the regulation of healthcare receive an appropriate degree of respect from the courts. In many circumstances, that respect should be substantial. No principle, however, requires or permits uncritical judicial acceptance of legislative judgments that improperly discount—or even countenance—increased risks to women's health and seek to justify those risks on the basis of putative medical uncertainty. Courts must always carefully assess what type and degree of uncertainty actually exists, and how legislative actions may burden the right to abortion—including by putting women in physical

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July 15, 2016)); Miss. Code Ann. §§ 41-41-151 to -169 (2016); Okla. Stat. Ann. tit. 63, §§ 1-737.7 to .16 (2015) (temporarily enjoined by the state district court in *Nova Health Sys. v. Pruitt*, Case No. CV-2015-1838 (Okla. Cty. Dist. Ct. Oct. 28, 2015)); W. Va. Code § 16-2O-1 (2016); *see also* Donovan, *D&E Abortion Bans* at 36.

[4] Dismemberment Abortion Ban Act of 2017, H.R. 1192, 115th Cong. (2017); Dismemberment Abortion Ban Act of 2016, S.B. 3306, 114th Cong. (2016).

peril, chilling them from seeking services, or causing the curtailment or elimination of services due to physicians' professional and ethical responsibilities to avoid undue risk and to protect women's health.

STATEMENT OF THE ISSUES

Whether the trial court correctly enjoined a state law that requires physicians to cause "fetal demise" before proceeding with standard D&E—the most common and safest second-trimester abortion procedure—based on the court's well-supported factual findings that the State's proposed compliance methods were not feasible and would subject women to significant medical risks.

STATEMENT OF THE CASE

This case deals with an Alabama statute that effectively criminalizes the most common method of second-trimester abortion, standard D&E, unless the physician first induces fetal demise before proceeding. Ala. Code §§ 26-23G-1 to -9 (2016).[5] Alabama argued before the district court that the law advances interests in "respect for human life; promoting integrity and ethics of the medical profession; and promoting respect for life, compassion,

[5] To comply with the law, a physician would have to verify or induce termination of any fetal heartbeat, which the parties and the court have referred to as "fetal demise," before performing an otherwise standard D&E procedure. Doc. 115 at 61 & n.18.

and humanity in society at large." Doc. 115 at 65. There is no evidence—and Alabama has not argued—that the statute serves any interest in avoiding fetal pain or that any such procedure is medically necessary for the health or safety of the woman.[6]

Standard D&E is a surgical abortion method that normally takes "between ten to fifteen minutes" and which the medical community has found to be extremely safe, "with a less than 1% chance of major complications." Doc. 115 at 62-63. Due to its low risk and relative simplicity, it is the only second-trimester abortion method that can be used in an outpatient setting, which makes it more accessible and less costly for patients. *Id.* at 63. Further, it is the only second-trimester abortion method used in the plaintiff clinics—which are the only clinics in Alabama providing abortions at or after 15 weeks of pregnancy. *Id.* at 63-64.

The Alabama statute would require doctors to undertake additional and invasive medical procedures to stop any fetal heartbeat before commencing the standard D&E procedure. Ala. Code §§ 26-23G-1 to -9 (2016). The

[6] "Fetal pain is not a biological possibility until 29 weeks, well beyond the range of standard D&E procedures and beyond the legal limit of abortion in the state of Alabama; the State does not dispute this." Doc. 115 at 65 n.21.

statute includes no legislative findings, and the state Legislature did not determine that these proposed methods were safe for patients. Doc. 115 at 65, 67.

At trial, Alabama contended that the law does not impose an undue burden on women because, in its view, compliance could be achieved safely with one of three methods: umbilical cord transection, digoxin injection, or potassium-chloride injection. Doc. 115 at 66. Plaintiffs—two board certified obstetrician-gynecologists and the clinics where they practice—and their experts disagreed, arguing that the methods were largely untested, difficult, and risky. *Id.* at 68-96. The district court carefully examined the feasibility of Alabama's proposed methods based on the evidence submitted by the parties, including testimony from both parties' experts. *Id.* at 72 n.24, 73 n.25. It concluded that, on the current record, the proposed demise methods were not feasible for the plaintiff clinics because each method: (1) was technically difficult to accomplish, particularly in contrast to the relative ease of a standard D&E, and there were no opportunities for doctor training; (2) was essentially an experimental procedure with no medical benefits to patients; and (3) significantly increased the risk of harm to patients. *Id.* at 79, 90-91, 96.

Under these circumstances, the district court found, doctors "are unlikely to continue to perform abortions at or after 15 weeks if required to use fetal-demise procedures." Doc. 115 at 78. It was undisputed that women would no longer be able to receive an abortion starting at 15 weeks anywhere in Alabama if the plaintiff clinics stop providing standard D&E procedures. *Id.* at 63-64 & n.20. As a result, women in Alabama "would likely lose their right to pre-viability abortion access at or after 15 weeks." *Id.* at 98. Thus, the district court held that Alabama's law is unconstitutional because it "would likely place substantial, and even insurmountable, obstacles before Alabama women seeking pre-viability abortions," constituting an undue burden as to which "the State's interests are insufficient to overcome the denial of Alabama women's right to terminate a pregnancy before viability." *Id.* at 98

SUMMARY OF ARGUMENT

Alabama and its amici challenge the decision of the district court in this case on two grounds: (1) that under *Gonzales v. Carhart*, 550 U.S. 124 (2007), a State may effectively prohibit the current standard and safe method of second-trimester abortion, D&E, if there is disagreement, or "medical uncertainty," about the safety of the alternative procedures that remain available after the State's regulation; and (2) that the district court

improperly applied *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to determine, based on the evidence before the court, that the statute imposed an undue burden on abortion access. Each of these arguments is incorrect.

First, the undue burden standard, set out in *Casey* and consistently reaffirmed by the Supreme Court, provides that a statute violates the Constitution if it "place[s] a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 878. Alabama rightly observes that abortion regulations may "impose an undue burden" if they "'impose[] significant health risks' on women seeking an abortion," because the risks are a substantial obstacle. Appellants' Br. 18 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000)).

But Alabama is incorrect that *Gonzales v. Carhart* holds as a "second part of this standard" that, as a matter of law, abortion regulations do *not* impose an undue burden if there is any "'medical uncertainty over whether the . . . prohibition creates significant health risks.'" Appellants' Br. 18 (quoting *Gonzales*, 550 U.S. at 164). The Court's decision in *Gonzales*, which upheld a ban on an unusual variant of D&E, rested on the premise that standard D&E—"the usual abortion method in this trimester"—remained available to all women. *Gonzales*, at 135, 161. *Gonzales* observed that

"medical uncertainty over whether [a law's] prohibition creates significant health risks" can leave room for legislative judgments. 550 U.S. at 164; *see id*. at 162-167. But that statement addressed only uncertainty about the need for an express statutory exception permitting use of the otherwise banned and uncommon procedure when necessary to protect a woman's health. *Id*. The Court's decision that no health exception was needed was premised on the *lack* of medical uncertainty about the safety of standard D&E, the remaining alternative procedure in that case. Nothing in *Gonzales* suggests that a court must accept a State's proposal for a wholesale transformation of the standard D&E procedure that would impose risk and medical uncertainty on all women seeking second-trimester abortion services.

Second, Louisiana and other state amici argue that the district court erred because its "analysis derived entirely [from] the Supreme Court's recent decision" in *Whole Woman's Health.* Amicus Br. of Atty. Gen. of Louisiana et al. ("Louisiana Br.") 17. In that case, the Supreme Court affirmed the courts' important fact-finding role in independently evaluating issues of "medical uncertainty" as they relate to an undue burden analysis. *Whole Woman's Health*, 136 S. Ct. at 2310. The Louisiana Amici argue that the rule of *Whole Woman's Health* applies only to laws that a State justifies "purely as health and safety regulations," whereas here Alabama's asserted

interest is in "promot[ing] respect for unborn life." Louisiana Br. 18. There is no such limitation on the undue burden standard established in *Casey* and applied in later cases, including *Whole Woman's Health*. As required by that standard, the district court engaged in critical fact-finding about the actual medical risks at issue to determine whether the statute, as a practical matter, imposed an undue burden. *Cf.* Louisiana Br. 21-22.

As the district court recognized, laws that create medical risk or medical uncertainty in abortion procedures can result in an undue burden on the right in a variety of ways—by placing some women at risk of physical harm, chilling others from exercising their rights, and decreasing access to services when doctors exercise their independent obligation to avoid such risks in the treatment of their patients. Thus, courts must carefully examine the evidence concerning risks and burdens, regardless of the State's asserted interest in enacting the regulation. Courts must "give significant weight to evidence in the judicial record," consider the expert evidence, and examine the claimed benefits and real-world burdens of a regulation. *See Whole Woman's Health*, 136 S. Ct. at 2310. This is exactly the process followed by the district court here, and its order preliminarily enjoining Alabama's statute should be affirmed.

ARGUMENT

I. A STATE'S REGULATION OF ABORTION PROCEDURES THAT PREVENTS ACCESS TO AN ESTABLISHED, SAFE PROCEDURE IS INVALID

Under established Supreme Court precedent, "there 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2299 (quoting *Casey*, 505 U.S. at 878) (emphasis omitted); *accord Gonzales*, 550 U.S. at 146. And the Supreme Court has "repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks." *Stenberg*, 530 U.S. at 931; *see also id*. at 938. Alabama agrees that abortion regulations may "impose an undue burden" if they "impose significant health risks on women seeking an abortion." Appellants' Br. 18.

Alabama incorrectly argues that *Gonzales v. Carhart* holds, as a "second part of this standard," that abortion regulations do *not* impose an undue burden, outside the context of a health exception, if there is any "'medical uncertainty over whether the . . . prohibition creates significant health risks.'" Appellants' Br. 18 (quoting *Gonzales*, 550 U.S. at 164).

Alabama agrees that its prohibition of the standard D&E procedure would be unconstitutional in the absence of "safe and effective alternatives," but it contends that a court may not invalidate a state regulation banning an abortion procedure if there is "medical uncertainty" about the safety and efficacy of alternative procedures that the State would require women and their physicians to use. Appellants' Br. 21, 26. That is, Alabama argues that *Gonzales* allows a State alone to "resolve any medical uncertainty regarding the comparative safety of these procedures" by requiring women to use the State's preferred alternative. Appellants' Br. 26. Alabama's argument distorts *Gonzales*'s holding, misreads *Gonzales*'s discussion of medical uncertainty, and would eviscerate the undue burden standard set out in *Casey*.

Gonzales's holding that Congress could ban the uncommon dilation and extraction ("D&X") procedure rested on the premise that standard D&E—"the usual abortion method in [the second] trimester"—remained available to all women. 550 U.S. at 135. Specifically, in its discussion of whether the ban imposed an undue burden, the Court did not suggest that medical uncertainty over a significant health risk would mean that a ban did not impose a "substantial obstacle." *Id.* at 156-60. Rather, it held that there was no substantial obstacle to women's right to access services because

"standard D&E" remained available to women—and on the medical safety of standard D&E, there was no medical uncertainty. *Id.* at 164. Thus, Alabama's argument that *Gonzales* reshaped the undue burden standard generally to require a "second part"—that there is no undue burden whenever there is medical uncertainty over the creation of significant health risks—is not supported by the Court's holding applying the undue burden standard.

In its discussion of whether an express health exception to the D&X procedure ban was required, *Gonzales* did observe that "medical uncertainty over whether [a law's] prohibition creates significant health risks" can leave room for legislative judgments. 550 U.S. at 164; *see id*. at 162-167. But that statement addressed only uncertainty about the need for an express statutory exception permitting the otherwise banned and unusual procedure when necessary to protect a woman's health. It did not address uncertainty about the safety of the remaining alternative procedure (standard D&E). *Id*. at 164. Indeed, the Court's decision that a health exception was not needed rested squarely on the *lack* of any medical uncertainty about the safety of standard D&E. *Id.* at 164-65.

The *Gonzales* Court emphasized that standard D&E was "a commonly used and generally accepted method," and its continued availability meant

the Act's lack of a health exception did "not construct a substantial obstacle to the abortion right." 550 U.S. at 165. In fact, in assessing undue burden, the Court underscored the high degree of medical *certainty*, discussing how "[e]xperts testifying for both sides" agreed the proposed alternative procedure of standard D&E was safe. *Id.* at 164. *Gonzales* concluded that medical uncertainty over whether the banned variant procedure would ever be necessary to preserve a woman's health (and thus whether the ban required a health exception) did not impose an undue burden as long as "abortion procedures that are considered to be safe alternatives" (standard D&E) were available, *id.* at 166-67, and a women who believed that D&X was medically necessary in her individual case could bring an as-applied challenge, *id.* at 167.[7]

Alabama argues that *Gonzales* allows the State, in all instances, "to resolve any medical uncertainty regarding the comparative safety" of proposed alternative procedures for the overwhelming majority of women who will be required to use them as a result of a prohibition on standard

[7] The district court noted that, unlike in *Gonzales*, an as-applied challenge to Alabama's statute was not feasible because there is "a set of widespread conditions" that makes the proffered alternative procedures unsafe for many different women and there would be no "'discrete and well-defined'" class as contemplated in *Gonzales*. Doc. 115 at 82-83 n.27 (quoting *Gonzales*, 550 U.S. at 167).

D&E. Appellants' Br. 26. But this does not follow from what the Court in *Gonzales* actually held. It held that a ban on an unusual procedure that did not contain an express health exception did not impose an undue burden on the right, even though there were remaining questions about whether some small group of women might need the D&X for health reasons; there were no such questions and no medical uncertainty over the safety of the standard D&E, which remained freely available. *Gonzales*, 550 U.S. at 165.[8] In contrast, in this case, if there is in fact any medical uncertainty, it is about whether the State's proposed alternative procedures, which would apply to all D&Es, are safe *at all*. And, unlike in *Gonzales*, Alabama's law would impose risk and uncertainty on all women seeking D&E, not merely on a small subset of women who might need to seek as-applied exceptions. Mandating a change in procedures where the State cannot show that standard,

[8] Other circuits have recognized that *Gonzales* does not permit restrictions that effectively prohibit the standard D&E procedure. For example, the Sixth Circuit's opinion in *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 331 (6th Cir. 2007), affirmed the district court decision (reached pre-*Gonzales*) that a Michigan statute regulating "partial-birth abortion" was unconstitutional. The court held: "The district court's decision that Michigan's broad abortion statute created an unconstitutional undue burden on a woman's right to terminate her pregnancy because it prohibits D&E was in full accordance with the Supreme Court's guidance in both *Stenberg* and *Ayotte*, and has in no way been undermined by the interim decision in *Gonzales*. It is therefore affirmed." *Id.* at 339.

safe options for termination of pregnancy remain available contravenes the holding of *Gonzales*.

Even if Alabama's reading of precedent were correct—which it is not—Alabama failed to establish "medical uncertainty" about the safety and efficacy of its proposed alternatives to standard D&E, which remains the safest and most common second-trimester abortion procedure. *See infra* Part II.B. The overwhelming weight of evidence before the court shows that each of the three proposed "fetal demise" methods—umbilical cord transection, digoxin injection, and potassium chloride injection—is an experimental procedure with varying effectiveness rates and potentially severe side effects. But even if Alabama were able to show some medical or scientific uncertainty about the safety and efficacy of these methods, the Supreme Court has made clear that, where the constitutional right to obtain an abortion is at stake, courts "retain[] an independent constitutional duty to review" the legislation and determine whether it imposes an undue burden. *Gonzales*, 550 U.S. at 165; *Whole Woman's Health*, 136 S. Ct. at 2310. A state cannot shield its legislation from judicial review merely by identifying the existence of some medical or scientific dispute.

II. THE DISTRICT COURT PROPERLY APPLIED THE UNDUE BURDEN STANDARD

A. The Undue Burden Standard Set Forth in *Casey* and Reaffirmed in *Gonzales* and *Whole Woman's Health* Applies Regardless of the State Interest Asserted To Justify a Particular Regulation

The Louisiana Amici argue that the Supreme Court's recent discussion and application of the undue burden standard in *Whole Woman's Health* is inapposite here, because that case involved laws justified "purely as health and safety regulations." Louisiana Br. 18. This is incorrect. The undue burden standard did not originate with *Whole Woman's Health*. It was set forth long ago in *Casey*, and applied in both *Gonzales* and *Whole Woman's Health* as the established test for evaluating all regulations of abortion, not merely those that purport to protect women's health or safety. For example, in rejecting the circuit court's formulation of the undue burden standard, the Court drew upon *Casey*'s formulation of the proper standard that applies regardless of how the State justifies its regulation. *Whole Woman's Health*, 136 S. Ct. at 2309; *see also id.* at 2310. The Court's reliance on these parts of *Casey* makes clear that its doctrinal statements are not limited to cases where statutes are purportedly passed to benefit women's health, but rather apply to statutes passed to meet the whole range of potential state interests.

The flaw in this argument is underscored by the broad language the Supreme Court used in *Whole Woman's Health* to reject the circuit court's cramped reading of the undue burden standard. The Court holds that the "rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. That language is not expressly or impliedly limited to "medical benefits" (or to any specific type of burden). *Casey* itself evaluated statutes passed to serve other state interests and create other asserted benefits. There is no basis for limiting the significance of *Whole Woman's Health*'s discussion and application of the undue burden standard to the particular circumstances of that case.

Moreover, the *Whole Woman's Health* Court does not suggest that it is reaffirming or applying an undue burden standard any different from the one applied in *Gonzales*. It is correct that the state interest asserted in *Gonzales* was respect for life, while the interest asserted in *Whole Woman's Health* was protecting women's health. But the Court in *Whole Woman's Health* relied on *Gonzales* in rejecting the circuit court's formulation of the undue burden standard. It cited *Gonzales* for the proposition that the "'*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*[.]'" *Whole Woman's Health*, 136 S. Ct. at

2310 (citation omitted, emphasis in original). Thus, the undue burden standard, as carried forward from *Casey* to *Gonzales* to *Whole Woman's Health,* applies to a court's review of a state law regardless of the asserted purpose for the law. Any attempt to distinguish *Whole Woman's Health* on this ground is unavailing.

B. The District Court Properly Examined the Evidence To Independently Determine Whether the Statute Imposed an Undue Burden

The Louisiana Amici also incorrectly claim that a "legislature's resolution of medical questions deserves more weight in a case like this than in a case like *Hellerstedt*," and that the district court erred in failing to "defer[]" to that legislative resolution and instead independently evaluating the evidence in the record. Louisiana Br. 2, 21-22. In general, States may legislate in situations of genuine medical uncertainty, potentially making difficult choices in deciding how best to promote specific public health goals. Nonetheless, as discussed above, the constitutional undue burden test articulated and applied in *Casey*, *Gonzales*, and *Whole Woman's Health* also applies to this case. *See Whole Woman's Health*, 136 S. Ct. at 2309-10; *Gonzales*, 550 U.S. at 165; *Casey*, 505 U.S. 887-98. In applying that test, courts may not simply defer to States' views or assertions about a law's burden on women's constitutional right to access abortion services. And

that principle remains the same regardless of what type of interest a State asserts in seeking to justify its particular regulation. *See Whole Woman's Health*, 136 S. Ct. at 2309-10. In all cases, courts must carefully examine the evidence concerning what burdens a challenged law imposes.

Laws that create medical risk or medical uncertainty in abortion procedures can result in an undue burden on the constitutional right—by placing some portion of women at risk of physical harm, chilling others from exercising their rights, and decreasing access to services when doctors exercise their independent obligation to avoid such risks in the treatment of their patients. These burdens may fall most heavily on a State's residents that are already in vulnerable or difficult situations. States have a duty to consider, and courts to scrutinize, the impacts of potential risk or medical uncertainty on the burden a state law imposes on all of a State's residents.

Appellants and their amici take issue with the district court's fact-finding and the weight that it gave to the facts found. Appellants' Br. 34-42; Louisiana Br. 21-22. But the Supreme Court in *Whole Woman's Health* reasserted that courts have an important fact-finding role in the *Casey* undue burden analysis. The Supreme Court specifically rejected the State's argument that "legislatures, and not courts, must resolve questions of medical uncertainty," as "inconsistent with this Court's case law." *Whole*

Woman's Health, 136 S. Ct. at 2310. It held that, "[f]or a district court to give significant weight to evidence in the judicial record . . . is consistent with this Court's case law." *Id.* As the Supreme Court explained, the district court in that case "applied the correct legal standard" when it "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony" and that it had "then weighed the asserted benefits against the burdens." *Id.*

The court's independent fact-finding role is particularly important where, as here, the relevant statute does not include any legislative findings, and where the State's asserted interests are something other than protecting women's health. And the district court did exactly what the Supreme Court has required: it gave significant weight to evidence in the judicial record, and rejected Alabama's assertions that the existence of any medical uncertainty meant the court must find the proposed fetal-demise methods safe. Doc. 115 at 67-96.

Consistent with *Whole Woman's Health*, the district court here properly considered the conflicting testimony of the parties' experts to determine whether the statute's creation of medical uncertainty concerning the safety of otherwise routine medical procedures resulted in an undue burden on women's constitutional rights. The court provided a well-founded

explanation for crediting the petitioners' experts over the State's, and determined that the State's proposed methods of fetal demise would create serious risks for women. Doc. 115 at 70-72 (discussing the evidence from the expert witnesses testimony); *id.* at 72 n.24 (describing the experts and explaining why plaintiffs' expert was more credible); *id.* at 73 n.25 (rejecting defense expert's testimony on certain points).

The district court determined, after weighing the evidence, that the State's proposed methods of medical compliance were not feasible for plaintiff clinics because each method: (1) was technically difficult to accomplish, particularly in contrast to the relative ease of a standard D&E, and there were no opportunities for doctor training; (2) was essentially an experimental procedure with no medical benefits to patients; and (3) significantly increased the risk of harm to patients. Doc. 115 at 67-96. Moreover, under these circumstances, doctors were "unlikely to continue to perform abortions at or after 15 weeks if required to use fetal-demise procedures." *Id.* at 78. It was undisputed that women would no longer be able to receive an abortion starting at 15 weeks anywhere in Alabama if the plaintiff clinics stop providing standard D&E procedures. *Id.* at 63 & n.20. The district court thus properly held that the burdens imposed by the new state law were not merely undue but "insurmountable," because the expert

testimony demonstrated that the statute would operate effectively as an absolute ban on the standard D&E procedure—and, indeed, on second-trimester abortions—that could not be outweighed by any benefit to the State's asserted interests. *Id.* at 98. That active investigation of the real-world impact of the law and the balancing of the resulting benefits and burdens is proper, and required, under *Casey*, *Gonzales*, and *Whole Woman's Health*.

Careful state and judicial examination of the burdens is particularly critical when access to abortion services in the second trimester is at stake. The overwhelming majority of women who have an abortion in the second trimester "would have preferred to have had their abortion earlier," but were unable to do so due to factors including cost and access barriers.[9] "In part because of their increased vulnerability to these barriers, low-income women and women of color are more likely than are other women to have second

[9] Lawrence B. Finer, et al., *Timing of steps and reasons for delays in obtaining abortions in the United States*, Contraception, 74(4):334, 341 (2006), https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/10/17/Contraception74-4-334_Finer.pdf.

trimester abortions."[10] It is these women who will suffer the most from improper restrictions on procedures.[11]

Women who learn of fetal anomalies or develop complications relating to their own health during pregnancy would also be disproportionately affected by prohibitions on standard D&E procedures such as Alabama's. Many such developments occur during the second trimester.[12] These women are already facing serious difficulties. The heavy weight of the burden of access limitations on these populations is an important consideration for the courts. It is proper for a court to consider these practical realities and to intervene to protect all women's rights and access to safe care.

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[10] Bonnie Scott Jones & Tracy A. Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 Am. J. of Pub. Health 623, 624 (Apr. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661467/.

[11] Am. Coll. of Obstetricians and Gynecologists, Comm. Op. No. 613, *Increasing Access to Abortion* 5 (Nov. 2014). One recent study, for example, found a higher likelihood of second-trimester abortion among women who needed financial assistance to be able to afford an abortion or lived 25 miles or more from an appropriate healthcare facility. *See* Rachel K. Jones and Jenna Jerman, *Characteristics and Circumstances of U.S. Women Who Obtain Very Early and Second-Trimester Abortions*, PLOS ONE, 12(1):e0169969, 1 (2007), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0169969.

[12] Donovan, *D&E Abortion Bans* at 37.

It is true that, in general, the existence of medical or scientific disagreement should not "tie [a] State's hands" and prevent it from regulating at all. *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) . (upholding legislative determination of dangerousness for pedophilia despite some disagreement among psychiatric community about the diagnosis). States have a duty to address potential threats to their residents' health, and that duty may require them to choose to act on the basis of one body of evidence and opinion rather than another. *Id*. But this general proposition does not relieve a State from its obligation to respect constitutional rights.

Moreover, in this case, Alabama's stated interest in medical integrity and ethics is served, not undermined, by ensuring that medical procedures are safe for women patients. As the district court observed, "[p]hysicians have an ethical obligation not to subject patients to potentially harmful procedures without any medical benefit" to the patient. Doc. 115 at 78. Protecting this ethical obligation is in line with the usual role States play in regulating medical care, namely, by increasing the safety of such care, rather than diminishing it in service of some other asserted state interest.

Amici do not lightly invite greater judicial scrutiny of state legislative judgments; but the uncritical deference and weight that Alabama and its amici argue such judgments should receive in this case would both fail to

give sufficient protection to the constitutional right to reproductive autonomy, and actually jeopardize the health and safety of women. In contrast, the district court in this case, following Supreme Court precedent, properly examined and weighed the evidence before it to determine the statute would impose an undue burden because of its risks to women's health and obstacles to access to care. The court's role is just as important, if not more important, in situations where the State does not—and could not—seek to justify a statute as advancing women's health. The district court properly filled that role here, and its judgment should be affirmed.

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CONCLUSION

The judgment of the district court should be affirmed.

Dated: May 1, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 5,582 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Dated: May 1, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

Dated: May 1, 2017

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